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Competition in Energy Markets – Note by Portugal

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More documents related to this discussion can be found at
www.oecd.org/competition/competition-in-energy-markets.htm

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Portugal

1. The energy markets in the latest years

1. **The Portuguese Competition Authority – Autoridade da Concorrência (AdC) has been closely following the energy sector**, namely the electricity and natural gas markets.
2. **The AdC has investigated and sanctioned practices that are restrictive of competition, has undertaken merger review and engaged in a variety of advocacy initiatives in the sector**, namely through market studies and sectoral inquiries and issuing opinions and recommendations concerning competition issues.

1.1. Antitrust investigation

3. Between 2015 and 2021, the AdC adopted five decisions regarding antitrust investigations in the energy sector. In three of the decisions, the AdC identified and sanctioned prohibited practices. In the remaining two cases, the AdC decided to close the proceedings.
4. In September 2019, the AdC imposed a fine of 48 million euros on EDP Produção for abuse of dominance. Specifically, EDP Produção withheld the capacity of power plants covered by the stranded costs compensations regime (hereinafter referred to as “CMEC regime”) in the secondary reserve market consistently between 2009 and 2013, diverting production to its market-based power plants (not covered by the CMEC regime). This behaviour led to the increase of consumers’ electricity bill, through an increase in the price of secondary reserve market and increased public compensation under the CMEC regime. In August 2022, the Competition, Regulation and Supervision Court (TCRS) upheld the AdC’s decision. Currently, the sentence is being scrutinized by the Lisbon Court of Appeal (TRL).
5. In May 2017, the AdC imposed a fine of 38.3 million euros on EDP and Sonae for entering into an anticompetitive market-sharing agreement. Under the agreement, EDP and Sonae agreed not to compete in the markets for the wholesale and retail distribution of electricity in mainland Portugal for 2 years. In September 2020, the TCRS upheld the AdC’s decision, while reducing the fine to 34.5 million euros. Currently, the sentence is being scrutinized by the TRL.
6. In January 2015, the AdC imposed a fine of 9.29 million euros on Galp for restricting competition. Each of the undertakings signed contracts with its distributors of bottled liquefied petroleum gas (LPG) prohibiting them from selling outside the geographical area established in the contracts. In January 2016, the TCRS upheld the decision by the AdC, while reducing the fine to 4.1 million euros. In January 2017, the sentence was upheld by the TRL.

1.2. Merger control

7. Between 2015 and 2021, the AdC adopted 37 decisions regarding mergers in the energy sector. The AdC cleared all those mergers, in three cases subject to compliance with commitments submitted by the undertakings to address the competition concerns identified by the AdC. Those commitments included divestment measures and/or behavioural measures.

1.3. Advocacy initiatives

8. **The AdC has undertaken a variety of advocacy initiatives** in energy markets. The AdC has regularly issued opinions within public consultations promoted by the Energy Services Regulatory Authority (ERSE) and by the ENMC – National Authority for the Fuels Market, E.P.E. (ENMC). The AdC is a Member of the Advisory Board of ERSE and participates in its regular meetings.

9. **These advocacy initiatives aim at promoting competition and efficiency in energy markets**, to the benefit of consumers, both in terms of prices and quality of service. In these advocacy initiatives, the AdC also seeks to **promote measures aimed at encouraging consumers to change their levels and patterns of consumption**, namely through the adoption of demand-side management measures.

10. **Given the scope and nature of the recommendations issued by the AdC in the energy sector, these advocacy initiatives also contribute to the recovery of the Portuguese economy** following the Covid-19 pandemic and, more recently, the conflict in Ukraine.

11. **The recommendations issued by the AdC cover a variety of aspects**, including: (i) electricity and natural gas tariffs and prices and parameters for the regulatory period; (ii) investment and development plans for electricity and natural gas distribution networks; (iii) transport and storage infrastructures, as well as terminal network development and investment plans regarding Liquefied Natural Gas (LNG); (iv) the legal and regulatory framework applicable to the electricity, natural gas and electric mobility sectors; (v) concession award for low voltage electricity distribution at the municipal level; (vi) smart power networks; (vii) taxation of the retail distribution of electricity and natural gas; (viii) European network code on harmonised transmission tariff structures for gas; (ix) quality of service in the electric and natural gas sectors; (x) risk management and guarantees in the electric and natural gas sectors; and (xi) margins and retail prices applicable to the bottled LPG sector.

12. The main recommendations issued by the AdC are briefly presented in chapter 1.3.1 (electricity sector), chapter 1.3.2 (natural gas sector), chapter 1.3.3 (bottled LPG sector) and chapter 1.3.4 (road fuel sector).

13. The recommendations issued by the AdC regarding measures designed to address the challenges brought about by the recent price increases in the energy sector are briefly presented in chapter 2.1 (electricity sector), chapter 2.2 (natural gas sector) and chapter 2.3 (bottled LPG and road fuel sectors).

1.3.1. Electricity sector

14. **In the electricity sector, at the wholesale level, the AdC has focused on the competitive conditions in the ancillary services market.** In these markets, the incumbent operator continues to hold a substantial share of generation capacity and the demand response is limited. **The AdC has been defending the adoption of measures aimed at promoting the entry** of new operators, namely producers of renewable electricity and producers of distributed electricity generation, and new technologies (batteries).

15. **At the retail level, the AdC has emphasized that the (progressive) liberalization of the retail electricity market is put at risk by the postponement of the transitional regime equivalent to regulated tariffs, alongside with the measures that instated the possibility of consumers to return to such regime** from the liberalized market. In particular, the AdC has sought to raise awareness as to the risk that these measures may entail in terms of exit of firms in the liberalised market.

16. **The AdC has also argued for the relevance of avoiding unnecessary costs that could yield price increases**, to be borne by the consumers. In particular, the AdC has argued that efforts should be made to contain energy, environmental and general economic interest policy costs, preventing further increases in the level of tariffs. Additionally, the AdC has highlighted the importance of exerting caution in the decisions related to network investments, highlighting the relevance of robust cost-benefit as well as ex-post assessment of the investment projects. The AdC has also defended that, given the characteristics of the market, the rates of return of the regulated assets should be reduced, having, as a reference, the rate of return of risk-free investments.

17. **Some of these recommendations regarding the electricity sector have been implemented**, with clear benefits for consumers. For example, the recommendations regarding the elimination of obstacles to the production of electricity for self-consumption and the elimination of payments to operators of hydro power plants for providing generation capacity.

1.3.2. Natural gas sector

18. **In the natural gas sector, the AdC has recommended the adoption of measures aimed at increasing the integration between the Portuguese and the Spanish wholesale gas markets.** This would lead to greater competition, to the benefit of consumers. Amongst others, the AdC has defended the elimination of the double application of transmission network access tariff in the imports of gas from Spain through pipeline at Campo Maior. The AdC has argued for the relevance of effectively extending MIBGAS to Portugal, creating a real Iberian Natural Gas Market, just like it was done for the electricity market (with MIBEL, the Iberian Electricity Market).

19. **The AdC has also recommended measures aimed at fostering the use of the LNG Terminal in Sines by small-scale operators.** To that aim, the AdC has argued for: (i) the adoption of market-based LNG auctions with a delivery point at the Sines terminal; and (ii) allowing for the exchange of natural gas between different delivery points of the National Gas System (swaps between locations), namely between the Sines terminal and the interconnection with Spain through pipeline at Campo Maior.

20. Additionally, **the AdC has argued for the auctioning of part of the annual planning of LNG carriers with delivery point at the LNG Terminal in Sines foreseen in the long-term take-or-pay contracts** signed before August 2003. The AdC has also proposed that any differences between the sale price and the base price (which should correspond to the purchase price set in the contract) should be channelled to the reduction of the tariffs applicable to the use of the terminal, to lower barriers to entry of new operators.

21. **The AdC has also argued for measures aimed at controlling costs**, that would ultimately be borne by consumers. The AdC highlighted that the remuneration for regulated assets accounted for a third of the price applicable to domestic consumers, and that caution should be exerted in decisions regarding network investments, which should be based by thorough cost-benefit analysis. The AdC has also argued for the reduction of rates of return of the regulated assets, so as to make them closer to those of risk-free investments.

22. **These views were already put forward in a sector inquiry on natural gas supply to industrial consumers, issued by AdC in October 2017¹.** In the sector inquiry, the AdC assessed the competitive conditions in the market and identified potential bottlenecks to competition, which could hinder the performance and the competitiveness

¹ Available [here](#), in Portuguese only.

of the supply of natural gas to the Portuguese industry. The sector inquiry led to a set of recommendations being issued by the AdC, aimed at promoting competition and mitigating the barriers to entry and expansion.

23. **Some of the recommendations of the AdC regarding the natural gas sector have been implemented**, with a positive impact in the competitive dynamics in the sector. For example, the adoption of rules applicable to the trade on the MIBGAS of products with delivery at the Portuguese Virtual Trading Point (VTP).

1.3.3. Bottled LPG sector

24. **In the bottled LPG sector, the AdC has emphasized that the relevance of effective access to relevant LPG storage facilities for competition in the sector.** Storage facilities are key for access to maritime imports. However, the access by third parties to these facilities is not yet implemented.

25. Moreover, **the AdC has advocated for the need to harmonize the LPG bottle reducers**, to make it easier for consumers to switch. Nevertheless, a cost-benefit analysis of the measure remains to be carried out.

26. **Regarding public interest considerations regarding economically vulnerable consumers**, the AdC has argued that the introduction of solidary tariffs allows pursuing that public interest goal, while minimizing the risk of distortions to competition.

27. **These recommendations also draw from the findings of an analysis undertaken by the AdC to the bottled LPG sector in mainland Portugal, issued in March 2017².** The analysis aimed at assessing the competitive conditions of the market and at identifying potential barriers to entry and expansion in the distribution of bottled LPG in mainland Portugal. The main focus of the recommendations put forward by the AdC in the report was the reduction of the barriers to entry and expansion.

28. **Some of these recommendations have been implemented**, improving the competitive conditions of the sector. As an example, following a recommendation by the AdC, a set of crucial LPG storage facilities were granted a public interest status, meaning that access to these facilities to third party operators should be provided in FRAND terms. Furthermore, also following a recommendation by the AdC, a set rules applicable to the reception, return and exchange of used LPG bottles were established.

1.3.4. Road fuel sector

29. **In the road fuel sector, the AdC has focused on imports and storage of road fuel**, which play a key role for the competitive conditions in the market.

30. **That was the focus of the several of the recommendations put forward by the AdC** in a report on the **liquid road fuel sector in mainland Portugal, issued in May 2018³.** **These recommendations** aimed at fostering competition across the road fuel sector value chain and enhancing consumers' welfare.

31. **Some of these recommendations are yet to be implemented.** For example, the completion of the oil pipeline connecting the Port of Sines, the Sines refinery, and the most important storage facility for road fuel in Portugal (in Aveiras). This recommendation, which aimed at fostering the conditions for accessing imports, was endorsed by the

² Available [here](#), in Portuguese only.

³ Available [here](#), in Portuguese only.

International Energy Agency (IEA)⁴. Also, the AdC has also argued for public tender procedures for awarding the sub-concessions of motorway fuel stations, for reducing the duration of the contracts and for pegging the remuneration of the concessionaire to the traffic on the motorway, rather than the quantity of fuel sold (which could decrease incentives for price competition).

2. The most recent developments in the energy markets

32. **The reopening of the economies in the wake of the Covid-19 pandemic and, more recently, the conflict in Ukraine have been driving energy price increases in many countries.** In Portugal, the annual inflation was 9,8% in September 2022⁵.

33. **The price increase in the energy sector has contributed significantly for the rise in inflation.** More recently, the conflict in Ukraine has led to higher energy prices, especially in the case of the natural gas market.

34. To tackle the loss of purchasing power by families and companies associated with inflation, **many Governments have implemented measures to limit the price rise in the energy sector.** The measures are very broad in range and scope and, consequently, with different degrees of impact in the competitive conditions in the market. Those measures include granting subsidies to the most affected households and/or companies, lowering the tax burden on energy prices, taxing the extraordinary profits of companies and price intervention (such as setting maximum prices or freezing prices).

35. **In Portugal, the main (temporary) measures involving the energy sector adopted by the Government consist of: (i) granting direct support to the economically vulnerable consumers of bottled LPG and to the natural gas intensive companies; (ii) reducing the tax burden on the prices of electricity, natural gas and road fuel; (iii) price intervention, namely in the wholesale electricity market and in the retail bottled LPG market; and (iv) allowing domestic consumers of natural gas to return from the liberalized market to the regulated market.**

36. **The most recent package of measures, adopted in September 2022, totalled 1.4 billion euros. Previously, the Government put forward measures to support families in offsetting the increase in the cost of living, valued in 4 billion €.**

37. **Regarding measures adopted by the Government to limit the rise of prices, the AdC has highlighted the relevance of competitive neutrality of public policy measures.** When applicable, the AdC has identified alternative measures that, while pursuing the same public policy objectives, are less likely to distort competition.

38. **Furthermore, as we face the double challenge of recovering the economy in times of inflation, the AdC has advocated for the adoption of structural measures (aimed at reducing the barriers to entry and expansion). The AdC has also advocated that measures such as granting direct support to the most affected households and companies and/or the lowering of the tax burden are less likely, in general, to distort competition than more interventive measures.**

⁴ See [“Portugal 2021 – Energy Policy Review”](#), published by the IEA in July 2021.

⁵ See [“Euro indicators 116/2022”](#), published by the Eurostat in 19 October 2022.

2.1. Electricity sector

39. **In May 2022, the Government approved an exceptional and temporary mechanism for setting the prices in the Iberian Electricity Market (MIBEL)⁶.** This measure resulted from intergovernmental cooperation between Portugal and Spain and that was approved (under the European State aid rules) by the European Commission, in June 2022. The mechanism, which will be in force between 15 June 2022 and 31 May 2023, sets a reference price applicable to the natural gas used to produce the electricity traded in the MIBEL, reducing the prices in the MIBEL.

40. **While the measure allows decoupling the price of electricity from the price spikes in natural gas, the AdC has also informed of potential medium- and long-term risks, so that they could be pondered by the public decision maker. Amongst these, the AdC noted the potential of the measure to jeopardize the security of supply, if it does not allow for the costs of the natural gas operators to be fully covered; (ii) discourage the production of electricity by operators that own power plants with storage, if it leads to a reduction in the range of the electricity price (between the price applicable in off-peak hours and the price applicable in peak hours); (iii) distortion of the intra-Community transit of electricity, given that the price ceases to be a signal of the relation between the supply and the demand; and (iv) affect the organized markets for specific term contracting, given that the price does not reflect the effective costs of the marginal power plants.**

2.2. Natural gas sector

41. **In September 2022, the Government approved the exceptional and temporary possibility of the consumers with a consumption lower than a certain amount to return, from the liberalized market to the regulated retail natural gas market⁷.** This harmonized the natural gas sector with the electricity sector, given that the return was already possible in the later. The measure was aimed at mitigating the effects, on families and small business, of the price increases in the wholesale natural gas market. In fact, regulated prices are, in general, more competitive, because the regulated market is supplied through the long-term take-or-pay contracts signed before August 2003.

42. **The AdC emphasized that the measure can hinder the liberalization of the retail natural gas market** and be detrimental to market efficiency, given that it could lead to the exit of operators, namely small-scale firms.

43. **The AdC also noted that auctioning part of the annual planning of LNG carriers with delivery point at the LNG Terminal in Sines foreseen in the long-term take-or-pay contracts would constitute an alternative measure** less likely to distort competition, while pursuing the same public policy objective (reduction of the retail prices).

44. **Previously, in March 2022, ERSE recommended the adoption of those auctions as part of a proposal for extraordinary measures for the National Gas System. ERSE's proposal included: (i) a regulated mechanism for selling natural gas; (ii) a mechanism for stabilizing the demand for natural gas; and (iii) measures related to the design and development of the MIBGAS and, in particular, of trading of products with delivery in**

⁶ See [Decree-Law n° 33/2022](#), in Portuguese only.

⁷ See [Decree-Law n° 57-B/2022](#), in Portuguese only.

Portugal (at the virtual trading point). According to ERSE, these measures aimed at mitigating the effects of the price increases in the wholesale natural gas market.

45. In its comments to the ERSE proposal⁸, of April 2022, **the AdC concluded that the measures were likely to foster competition in the market**, to ensure the stability of retail supply and, as such, to mitigate the risk of insolvency of market agents.

46. **The AdC highlighted that some of the measures were in line with its prior recommendations regarding the natural gas sector**⁹. One such examples was the auctioning of part of the annual planning of LNG carriers with delivery point at the LNG Terminal in Sines foreseen in the long-term take-or-pay contracts.

47. **The AdC also took the opportunity to reiterate the relevance of eliminating the double application of transmission network access tariff in the imports of gas from Spain through pipeline at Campo Maior**, so as to increase the development of MIBGAS.

2.3. Bottled LPG and road fuel sectors

48. **In October 2021, the Parliament approved the possibility to, exceptionally and temporarily, set maximum margins in any of the commercial components that make up the retail prices of bottled LPG and road fuel**¹⁰. The measure was aimed at safeguarding the smooth functioning of the market and at protecting consumers. The maximum margins are to be set by the Government, upon proposal by ERSE and after hearing the AdC.

49. In its comments on the draft Law¹¹, of September 2021, **the AdC highlighted that regulatory regimes of maximum prices or margins entail risks to the competition**. Amongst those risks are the exit of operators and the scarcity of supply (if maximum prices are too low), the decrease of investments and the use of maximum prices as focal points for collusion (if maximum prices are higher than market prices).

50. **As such, the AdC considered that the duration of such a regulatory regime should be limited to the period of time strictly necessary** to address the underlying public policy objectives.

51. Moreover, **the AdC reiterated its previous recommendations to implement an effective access to crucial LPG and road fuel storage facilities, to harmonize the LPG bottle reducers and to implement measures focused on economically vulnerable consumers**. Those recommendations have been promoted by the AdC in several instances¹² as being adequate and proportionate ways to foster competition and to protect consumer welfare in a more efficient and long-term approach.

52. **In May and August 2022, the AdC reiterated these conclusions in its comments to two subsequent initiatives by ERSE: (i) ERSE's proposal for the level of maximum**

⁸ Available [here](#), in Portuguese only.

⁹ See chapter 1.3.2.

¹⁰ See [Law n° 69-A/2021](#), in Portuguese only.

¹¹ Available [here](#), in Portuguese only.

¹² See chapter 1.3.3.

margins and retail prices of bottled LPG¹³; and (ii) ERSE's proposal for a methodology for supervision of the National Petroleum System¹⁴.

53. Additionally, **in March 2022, the Government approved an extraordinary and exceptional economic support to the most economically vulnerable consumers for the acquisition of bottled LPG¹⁵.** The measure was aimed at mitigating the effects of price increases in the natural gas market on vulnerable consumers. The economic support, which was in force between 1 April and 30 June 2022, consisted of 10 € per bottle of LPG with a monthly limit of one bottle per consumer.

54. Given that prices continued to increase, **in October 2022, the Government approved an analogous economic support¹⁶,** to be in force between 1 September and 31 December 2022.

55. **Regarding these particular measures, the AdC considered that they were not likely to raise competition concerns, as they are less prone to distort competition in the market.**

¹³ See [Government Order n° 205-A/2022](#), in Portuguese only, setting retail prices set by the Government to be in force between 16 August and 31 October 2022.

¹⁴ See [AdC's comments on the ERSE's proposal for a methodology for supervision of the National Petroleum System](#), in Portuguese only.

¹⁵ See [Order n° 3696-D/2022](#), in Portuguese only.

¹⁶ See [Order n° 12230/2022](#), in Portuguese only.